IV. Capital Case Commission Deliberations and Recommendations

1. Capital Litigation Resources Legislation

In 2001, eight capital cases were being delayed at the post-conviction relief ("PCR") stage because no qualified lawyers were available to represent the defendants. Some of those defendants had been waiting for over 18 months for a lawyer to be appointed to represent them at the PCR stage, which must be completed before a defendant pursues the final layer of appeals in federal court. Exhibit 28 of the Data Set I Research Report (Attachment "B") shows time intervals for the PCR process. Upon the recommendation of the Direct Appeal/PCR Subcommittee, the Commission initially endorsed draft legislation that would create a statewide capital public defender office to represent indigent capital defendants in post-conviction relief proceedings.

At a subsequent meeting, the Commission considered information provided by the defense bar, trial judges, and prosecutors regarding the need for a statewide public defender office for capital cases at the trial level, particularly in rural counties. The Commission noted the difficulty recruiting public defenders in the rural counties and the lack of resources needed to bring competent lawyers from urban areas into the rural areas for capital defense work. The Commission was unanimous in its belief that establishing a statewide public defender office for capital cases would be the best and most effective way to improve death penalty trials in Arizona. Legislation was drafted that would include both trial defenders for rural Arizona and PCR defenders for all of Arizona. The proposed bill was submitted to the 2001 and 2002 State Legislative Sessions, but failed.

The Capital Case Commission reaffirms the following statement:

> The Commission unanimously agrees that additional resources must be made available for capital cases and it deeply regrets the Legislature did not address this need this year. The objective of the Capital Case Commission "is to review the capital punishment process in Arizona in its entirety to ensure that it works in a fair, timely and orderly manner." A necessary condition of a "fair" capital system is competent defense representation. A necessary condition of a "timely and orderly" capital system is adequate resources for defense counsel and for prosecutors in cases where the death penalty is sought. The needs are particularly acute for defense counsel in all post-conviction relief proceedings, and for prosecutors and defense counsel at the trial level in the rural counties. The Commission therefore urges the Legislature to consider and pass legislation appropriating monies for capital litigation resources at the earliest possible opportunity.

The Capital Case Commission strongly recommends that resources legislation be reintroduced and adopted in the 2003 Regular Legislative Session.

2. Audio or Video Recording of Interviews

The Commission deliberated regarding the issue of electronic recording of police interrogations. Some states require audio or video recording of interrogations and confessions based on court decision or statute. While there was discussion as to whether the adoption of a recording requirement is best dealt with by voluntary action of law enforcement agencies, the Trial Issues Subcommittee concluded that routine electronic recording of all custodial interrogations and confessions would be a major improvement in criminal procedure and should be encouraged.

Upon recommendation of the Capital Case Commission, the Attorney General's Office drafted a protocol that was considered and discussed by the Attorney General's Law Enforcement Advisory Board, which represents police agencies across Arizona. The Advisory Board agreed to submit the protocol to the Arizona Criminal Justice Commission for consideration. The proposed protocol follows:

> The Attorney General and the Capital Case Commission strongly recommend that law enforcement officers in Arizona record with audio tape or video tape the process of informing a suspect of his constitutional rights, the waiver of those rights by the suspect, and all questions and answers of that suspect during interrogation whenever feasible.
>
> Under the protocol, if the questioning occurs in a place of detention such as a police department, a sheriff's substation, or jail, the need for audio or video recording of the interrogation is even more pressing. However, even in these circumstances the discretion of the law enforcement officer is employed and recording should take place whenever feasible.

3. Minimum Age For Capital Punishment

The United States Supreme Court has held that the United States Constitution does not prohibit the execution of defendants who were 16 years or older when they committed a murder. The federal government, and many states have imposed age 18 as the minimum at which a defendant is eligible for the death penalty. The United Nations and the American Bar Association recommend the higher minimum age.

Arguments in favor of changing the minimum age from 16 to 18 in Arizona are similar to those advanced in opposition to executing persons with mental retardation. A child or adolescent normally does not possess the level of moral responsibility and culpability that society expects of an adult. Arguments against enacting a minimum age center primarily on the fact that the defendant's age is already being considered to be a significant mitigating circumstance; the only cases involving 16 or 17-year-old defendants sentenced to death in Arizona have been ones with particularly egregious aggravating circumstances.

The Commission recommended by a vote of 15 to 8 that the death penalty in Arizona not apply to defendants who were under the age of 18 at the time of the murder. Legislation introduced in the 2002 State Legislative Session that would make defendants under the age of 18 at the time of their crime ineligible for the death penalty failed. It is anticipated that similar legislation will be reintroduced in the 2003 Regular Legislative Session.

4. Mental Retardation

The death penalty is meant to be reserved for the most culpable offenders. Many believe that mentally retarded persons do not fall into the "most culpable" category. Some persons with mental retardation suffer from substantial disabilities affecting reasoning, cognitive functioning, control of impulsivity, and understanding of the basic relationship between cause and effect. Some argue that these disabilities hamper a defendant's ability to act with the level of culpability that would justify imposition of a death sentence.

Initial deliberations resulted in a recommendation from the Pretrial Issues Subcommittee, with some dissent, prohibiting the execution of defendants with mental retardation. Later, the Commission debated whether current law, e.g., competence to stand trial, the insanity defense, a rigorous mitigation hearing and the competence to be executed statute, provided adequate safeguards to ensure that a mentally retarded person would not be executed in Arizona. Ultimately, the Commission reached consensus that, as a matter of public policy, Arizona should not execute a defendant who is mentally retarded. The Commission also recommended, with dissent, that a statute be enacted ensuring that the mentally retarded are not eligible for the death penalty. Legislation codifying this recommendation was signed into law on April 26, 2001. The legislation requires a pre-trial screening for mental retardation in capital cases.

On June 20, 2002, the United States Supreme Court held that the execution of a mentally retarded defendant violates the Eighth Amendment to the U.S. Constitution. *Atkins v. Virginia*, 122 S. Ct. 2242 (2002). Arizona's new statute remains significant, however, in that it provides a mechanism to ensure that the issue of mental retardation is considered early in the proceedings.

5. Notice of Intent to Seek the Death Penalty Under Ariz. R. Crim. P. 15.1(g)(1)

On January 30, 2001, the Commission heard reports from both the Pre-Trial Issues Subcommittee and the Trial Issues Subcommittee recommending amendment of Rule 15.1(g) of the Arizona Rules of Criminal Procedure to extend the time for prosecutors to file a notice of intent to seek the death penalty. The Commission agreed and recommended that Rule 15.1 be amended to extend the time for filing of death penalty notices to 60 days after arraignment with an additional extension of time available by stipulation from the parties and approval of the superior court judge. This rule change is intended to allow the prosecutor to consider mitigating evidence presented by the defense before filing the notice and to allow the prosecutor more time to deliberate over the decision whether to seek the death penalty.

The Commission's recommendations for changes to Rule 15.1(g) was adopted by the Arizona Supreme Court effective June 1, 2002.

6. Selection of Capital Cases

On March 28, 2001, the Commission received and approved the Pre-Trial Issues Subcommittee's unanimous recommendation that all prosecuting agencies involved in capital case prosecution adopt a written policy for identifying cases in which to seek the death penalty. Such policies should include soliciting or accepting defense input before deciding to seek the death penalty. This recommendation will be submitted to the Arizona Prosecuting Attorneys' Advisory Council for consideration.

7. Competence of Counsel

The Commission deliberated extensively on the issue of competence of counsel in capital cases. The Data/Research Subcommittee identified the number of cases that were overturned based on ineffective assistance of counsel from 1974 through 2000, and reported in Exhibit 24 of the Data Set I Research Report that 19 defendants received a reversal, remand, or modification in their case based on ineffective assistance of counsel. Of the 19, 13 were granted resentencings and 6 defendants were granted new trials. For a review of the issues cited as the basis for reversals, remands and modifications for all 230 cases in Data Set I, see Exhibit 14 of the Data Set I Research Report, Attachment B.

There was initial support for a peer review program for capital defense attorneys. However, peer review was deemed too subjective, and was ultimately rejected. Commission members urge Superior Court judges to verify early in a capital case that counsel are competent under the standards in Rule 6.8. Commission members also urge judges to hold hearings, if necessary, to advise defendants regarding competency of counsel, as is done when issues arise regarding possible conflicts of interest on the part of defense counsel.

The Commission also addressed whether a finding of ineffective assistance of counsel should result in the mandatory reporting of that attorney to the State Bar, the mandatory removal of that attorney from the list of eligible attorneys to be appointed under Rule 6.8, or reporting to the county's appointing authority for indigent defense. On March 28, 2001, the Trial Issues Subcommittee recommended against mandatory reporting of defense attorneys when there is a finding by a court of ineffective assistance of counsel. There is already a duty incumbent on lawyers and judges to report ethical violations under Ethical Rule 8.3 of the Rules of Professional Responsibility. The Subcommittee noted that the reporting under Ethical Rule 8.3 is done on a case-by-case basis, and that a particular finding of ineffective assistance of counsel by a trial or appellate court may not correspond to an ethical violation. The Commission approved this recommendation.

The Trial Issues Subcommittee recommended, and the Commission concurred, that Ethical Rule 1.1 should be amended to include a provision regarding the competence of lawyers representing capital defendants as follows:

> A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. A LAWYER WHO REPRESENTS A CAPITAL DEFENDANT SHALL COMPLY WITH THE STANDARDS SET FORTH IN ARIZ. R. CRIM.. P. 6.8 REGARDING STANDARDS FOR APPOINTMENT OF COUNSEL IN CAPITAL CASES.

The Subcommittee and the Commission also recommended that the Comment to Ethical Rule 1.1 be amended to include this best practice advice:

> BECAUSE THE AMERICAN BAR ASSOCIATION GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES RECOMMEND TWO LAWYERS BE ASSIGNED TO EVERY CAPITAL CASE, LAWYERS SHALL ENSURE THAT TWO LAWYERS REPRESENT EVERY CAPITAL DEFENDANT WHENEVER FEASIBLE IN TRIAL PROCEEDINGS.

The Arizona Bar Association's Ethical Rule Review Group considered the Commission's recommendations on competence and recommended an additional Comment in ER 1.1. The Ethical Rule Review Group also made several changes to the ethical rules governing the obligations of supervisors in public law offices. On November 22, 2002, the Board of Governors approved these changes and forwarded them to the Arizona Supreme Court recommending that they be adopted. Public comment will take place in 2003 on the Board of Governors proposed rules which are reprinted as Appendix "A."

8. Legal and Judicial Education

The Trial Issues Subcommittee recommended to the Commission that Rule 45(a) of the Rules of Arizona Supreme Court be amended regarding continuing legal and judicial education. The proposed amendment would require (1) prosecutors to have at least six hours of continuing legal education in capital litigation, including education in ethical duties within the preceding three years of being assigned a capital case; and (2) judges to have at least six hours of judicial education in capital litigation within the preceding three years of being assigned a capital case. The Attorney General will prepare a Petition to amend Rule 45(a) for submission to the Arizona Supreme Court on behalf of the Capital Case Commission.

9. Mitigation Specialists

The Commission approved the Trial Issues Subcommittee's recommendation to amend Rule 15 of the Arizona Rules of Criminal Procedure to provide for the appointment of investigators and expert witnesses for indigent defendants. This amendment will allow capital defendants to obtain mitigation specialists at county expense in all capital cases at the beginning of the case. The Attorney General's Office submitted the proposed amendment, which was adopted with minor modifications by the Arizona Supreme Court. The modifications related primarily to the Commission's recommendation that there be a prohibition against ex-parte requests for mitigation specialists. The final version of Rule 15.9, which became effective December 1, 2002, provides as follows:

Rule 15.9 Appointment of Investigators and Expert Witnesses for Indigent Defendants

a. An indigent defendant may apply for the assistance of an investigator and expert witness, and in a capital case an indigent defendant may also apply for the appointment of a mitigation specialist, to be paid at county expense if the defendant can show that such assistance is reasonably necessary to present a defense adequately at trial or sentencing.

b. No ex parte proceeding, communication, or request may be considered pursuant to this rule unless a proper showing is made concerning the need for confidentiality. Any such proceeding, communication, or request shall be transcribed and made a part of the record available for appellate review.

c. As used in the Rule, a "mitigation specialist" is a person qualified by knowledge, skill, experience, or other training as a mental health or sociology professional to investigate, evaluate, and present psycho-social and other mitigating evidence.

10. Proposed Reforms to Rules 31 and 32 of the Arizona Rules of Criminal Procedure

The Commission considered reforms to Rules 31 and 32 to eliminate some of the prolonged time intervals in these appellate proceedings. The Commission noted that the Arizona Supreme Court's most recent changes to Rule 32 included a Comment specifically stating that:

> The Supreme Court did not have the benefit of the comments of a statewide Commission which was empaneled that year by the Attorney General of Arizona to investigate and assess the administration of the death penalty in the State of Arizona. Accordingly, further amendments to Ariz. R. Crim. P. 32 may be necessary following the issuance of that Commission's recommendations. In particular, the topics of deadlines and victims' rights may need to be addressed at that time.

The Commission also considered victims' rights to a "prompt and final conclusion of the case after conviction and sentence" under the Arizona Constitution in Article 2, Section 2.1(10). The Commission tried to balance that right with the defendant's right to a fair appellate process, including adequate preparation time. Unable to reach consensus, the Commission asked the Direct Appeal/PCR Subcommittee to reconvene on the issue of the victim's right to a prompt and final conclusion in criminal cases and to debate any other rule changes to Rules 31 and 32 that specifically relate to the death penalty and that could reduce time intervals in the appellate process.

The Direct Appeal/PCR Subcommittee addressed whether a victim should have an opportunity to be heard in all appellate proceedings where there is a request for an extension of time. After hearing input from the Subcommittee, the Commission deliberated on two proposed Amendments to Rules 31.27 and 32. The Commission unanimously recommended the following rule change regarding appellate extensions:

In any capital case, in ruling on any request for an extension of a time limit set in this rule, the court shall consider the rights of the defendant and any victim to prompt and final resolution of the case.

Comment: To implement the victim's right to a prompt and final conclusion of the case, see Ariz. Const. Art. 2, § 2.1(A)(10), the victim shall be permitted to file a statement with the court, at the inception of the proceeding, which expresses their views with respect to any extensions. Or, the victim can request, pursuant to A.R.S. § 13-4411, that the prosecutor's office communicate the victim's views to the court concerning any extensions.

The Arizona Supreme Court adopted this proposed change, effective June 1, 2002.
The Commission also considered a substitute motion proposed by Commission member Steve Twist that would create a victim's right to be heard in appellate motions for extensions of time. The Commission defeated the following proposed rule by a vote of 11 to 8.

In any capital case, in ruling on any second or subsequent request for an extension by a party of more than 30 days, the court, after giving any victim who has filed a request pursuant to A.R.S. 13-4411, the opportunity to be heard in writing, shall consider the rights of the defendant and the rights of any victim to a prompt and final conclusion of the case.

Comment: To implement the victim's right to a prompt and final conclusion to their case, see Ariz. Const. Art. 2, § 2.1(A)(10), the victim, upon request, shall be permitted to be heard in writing with respect to any lengthy or repetitive extensions or the victim can request that the prosecutor's office communicate the victim's views to the court concerning any extensions.

11. Jury Deliberation in Capital Cases

In May 2000, Judges B. Michael Dann, Michael Brown, Robert Myers and Barry Schneider filed, on behalf of the Supreme Court Committee on the More Effective Use of Juries, a Petition to Amend Arizona's Rules of Court relating to juror discussions of the evidence during trial. The proposed rule change would allow jurors in criminal cases to deliberate before receiving final instructions by the trial judge at the close of the case.

The Trial Issues Subcommittee disagreed with the proposed amendments, reasoning that the sequence might give the prosecution an unfair advantage. The Subcommittee further noted that the United States Supreme Court has not approved such early deliberations in criminal cases. The Commission concurred with the recommendation of the Trial Issues Subcommittee and instructed the Attorney General's Office to submit comments opposing the Petition to Amend. Comments were filed and appear in Appendix D of the Interim Report. The Arizona Supreme Court denied the petition to amend the criminal rules.

12. When a Peace Officer is Murdered

On March 28, 2001, the Commission heard a report from the Pre-Trial Issues Subcommittee regarding aggravating factors. The Subcommittee reported that the current statute provides for the possibility of capital punishment only in those cases in which "the murdered person was an on duty peace officer who was killed in the course of performing his official duties. . . ." A.R.S. § 13–703(F)(10). If a police officer were murdered because of his status as a police officer, but the officer was in an off-duty capacity, current law would not authorize capital punishment. By a vote of 7 to 1, the Subcommittee recommended extending the aggravating factor to include peace officers killed while not performing official duties as long as the murder was motivated by the peace officer's status. The Commission approved the recommendation and proposed language (see Interim Report, Appendix D) that was brought before the Attorney General's Law Enforcement Advisory Board for consideration. After extensive deliberation, however, the Attorney General's Law Enforcement Advisory Board rejected the recommendation based on its view that the additional aggravator is not necessary.

13. Victim Impact at Aggravation/Mitigation Hearings

The Commission deliberated on the capital sentencing process and the need to ensure that victim impact evidence is presented to the court along with the defendant's allocution at a time when the court may thoughtfully consider such evidence prior to sentencing. The Trial Issues Subcommittee recommended to the Commission that trial judges hear victim impact evidence during the aggravation and mitigation hearing before sentencing the defendant and filing the special verdict. The Trial Issues Subcommittee also recommended an amendment to Rule 26.3 of the Arizona Rules of Criminal Procedure, the Comment to that Rule, and Administrative Order 94–16, to ensure that capital case sentencing is conducted in a proper sequence. The Subcommittee's proposed rule, comment, and order appear in Appendix B of the Interim Report.

On May 15, 2001, the Commission edited the proposed amendments to Rule 26.3 to allow the victim to "be heard" at the aggravation and mitigation hearing, to allow the defendant the right of allocution and to require the court to set a sentencing date no earlier than seven (7) days after the aggravation/mitigation hearing in order to properly reflect on the events of the hearing.

The Capital Case Commission's proposed changes to Rule 26.3 were adopted by the Arizona Supreme Court effective June 1, 2002. However, the changes relating to the timing of the aggravation/mitigation hearing have been rendered inapplicable because of the statutory change to jury sentencing in capital cases following the *Ring* decision.

14. Residual Doubt in Sentencing

On March 28, 2001, the Commission received and approved the Pre-Trial Issues Subcommittee's report stating that residual doubt should not be added to Arizona's list of statutory mitigators found in A.R.S. § 13–703(G) largely because the strength of the government's proof of guilt may already be considered during the sentencing phase of a capital case.

At the January 22, 2002 Capital Case Commission meeting, Arizona Supreme Court Justice Stanley Feldman urged the Commission to reconsider making "residual" or "lingering doubt" a statutory

mitigating circumstance. Both the Pretrial Issues and Direct Appeal/PCR Subcommittees agreed to re-examine the issue.

Current law appears to provide a basis for considering, as non-statutory mitigation, the strength of the government's case and residual doubt as to guilt. See *State v. Verdugo*, 112 Ariz. 288, 292, 541 P.2d 388, 392 (1975), and *State v. Pandeli*, 200 Ariz. 365, 26 P.2d 113 (2001). The Commission declined to recommend making residual or lingering doubt a statutory mitigating circumstance.

15. Clerks of Court and Court Reporters' Procedures

In its February and March, 2001 meetings, the Commission considered the prolonged time intervals in the direct appeal process for capital cases. These time intervals are depicted in Exhibits 25, 27 and 30 of the Data Set I Research Report. The Commission heard a report from the Direct Appeal/PCR Subcommittee regarding delays in the system due to missing court documents, pleadings and exhibits, and the difficulties in obtaining transcripts of trial proceedings. The Subcommittee met with elected court clerks and with court reporters from around Arizona.

On March 28, the Direct Appeal/PCR Subcommittee made three recommendations which were approved by the Commission. First, the Commission recommends amending Rule 31.9 of the Arizona Rules of Criminal Procedure so that the clerk of the court in capital cases will be required to notify all court reporters, within ten days of the filing of the notice of appeal, to compile all transcripts for submission to the Clerk of the Supreme Court. This rule change is designed to give the court reporters more timely notice and to expedite preparation of transcripts. Secondly, the Commission recommends as a best practice that trial judges order the transcription of all trial proceedings in every first-degree murder case at the time a guilty verdict is returned. This will cause reporters and clerks to begin the transcription process and the process of gathering exhibits, pleadings and minute entries well before the sentencing date. This practice will expedite transmission of the record in a capital case, and will hopefully preserve the record in a more disciplined fashion.

Thirdly, the Commission recommends as a best practice that superior court clerks enter a code on all criminal calendars that clearly identifies all first-degree murder cases for use by reporters and court clerks. No matter what code the local clerk ultimately selects, the calendar will communicate to the court reporter and to the courtroom clerks that the matter is potentially a capital case and that records should be assembled early and safeguarded with the utmost care. Court reporters will then know that transcripts must be readily available immediately after sentencing because the record in all capital cases must be sent to the Supreme Court within 45 days after the filing of the notice of appeal. The courtroom clerks will be put on notice that because this is a capital case, the attorneys will later request every piece of paper, pleading and minute entry in the case to ensure that the law was followed in the litigation of the case. The Commission concluded that these reforms will help to eliminate some of the prolonged time intervals in the capital case appellate process. The Commission's proposed Rule 31.9 is reprinted in Attachment A, Appendix D, paragraph 11.

The Capital Case Commission's recommended changes to Rule 31.9 were adopted by the Arizona Supreme Court effective June 1, 2002.

16. File Repository

The Commission debated the issues of prolonged intervals in PCR proceedings (depicted in Exhibits 25, 28 and 31 of the Data Set I Research Report, Attachment B), and adopted two recommendations in this regard. The Commission recommends that a repository be created in each county for all trial and appellate defense files so that PCR counsel can readily locate files from one location. The repository must be controlled by the defense team, and strict confidentiality must be maintained.

Additional discussion is needed with court administrators, prosecutors and defense counsel in order to implement this recommendation.

17. Competency to be Executed

The Commission first heard a report on the issue of competency to be executed on January 30, 2001, from Mr. James Bush on behalf of the Pre-Trial Issues Subcommittee. The Commission considered Mr. Bush's written recommendations and heard a three-part recommendation from the Pre-Trial Issues Subcommittee. First, the Pre-Trial Issues Subcommittee recommended that the Commission consider and debate a proposal that defendants found mentally incompetent after the issuance of a death warrant have their sentences converted to life imprisonment. The Subcommittee reported that this factual scenario would arise in the context of a judicial competency hearing in which the defendant is found incompetent and will not regain competency. Second, the Subcommittee recommended that the Commission consider and debate the current standards applicable to incompetence to determine if the standards as currently applied require modification. Third, the Subcommittee recommended that the Commission consider changes to the statute under which Arizona conducts restoration to competency, A.R.S. §§ 13–4021 through 4024.

On February 28, 2001, the Commission again discussed the issue of competency to be executed. The Commission asked the Pre-Trial Issues Subcommittee to reconsider the issue and make a recommendation.

On March 28, 2001, the Commission heard the report from the Pre-Trial Issues Subcommittee which reflected substantial debate at two meetings on March 13 and March 20, 2001. The Subcommittee reported that it had debated a Maryland statute that provides that a death sentence must be commuted to life imprisonment if a defendant becomes incompetent after being sentenced to death. The Subcommittee also considered whether Arizona doctors should be prohibited from treating any defendant facing capital punishment so that Arizona policy would reflect that no restoration to competency may take place. The Subcommittee voted 6 to 3 with one abstention to present the following recommendation to the Commission.

> The Pre-Trial Issues Subcommittee recommends to the Commission that Arizona change its legislation to require the commutation of a death sentence to the maximum sentence lawfully imposeable when the defendant is found incompetent after the issuance of a death warrant.

After deliberation, the Commission voted 12 to 8 with one abstention to accept the subcommittee's recommendation. Legislation was introduced in the 2002 State Legislative Session but failed. It is anticipated that similar legislation will be reintroduced in the 2003 Regular Legislative Session.

18. Maintaining Capital Case Data

This endeavor was undertaken by the researchers and staff of the Center for Urban Inquiry, College of Public Programs at Arizona State University, with help from community members, county clerks offices, county attorney offices, county pretrial services, victim/witness programs, the Department of Corrections, the Arizona Supreme Court and the Arizona Attorney General's Office. Results of this comprehensive study of the death penalty in Arizona are displayed in Data Set I and Data Set II.

After twenty-four months of empirical data collection, it is the recommendation of the Commission that the Attorney General's Office and the Center for Urban Inquiry continue to gather data. The Attorney General's Office will continue to gather data to update Data Set I; and the Center for Urban Inquiry will maintain Data Set II.

Several recommendations of the Capital Case Commission require additional study, and the Commission accordingly recommends that a subgroup of the Data/Research Subcommittee continue to deliberate and develop processes and protocols to implement Commission recommendations.

19. Preservation of DNA Evidence

The evolution of DNA testing now makes possible effective testing of biological materials left at crime scenes and comparisons with a defendant's DNA. This powerful evidence may be incriminating or exculpatory and can effectively prove guilt or innocence.

The preservation of DNA evidence was deliberated by the Trial Issues Subcommittee and the Direct Appeal/PCR Subcommittee. The Direct Appeal/PCR Subcommittee noted that A.R.S. § 13–4013 provides for DNA testing along with all other expert witness and investigative services when "reasonably necessary" to an adequate defense. Further, PCR DNA testing is required under A.R.S. § 13–4240 under carefully drawn standards enacted by the 2002 Legislature. The Direct Appeal/PCR Subcommittee did not support further legislation or court rule for the preservation and testing of evidence. Several concerns were raised with requiring law enforcement to preserve all evidence in every case in which the charge of murder is being investigated by a police agency. First, sometimes the consumption of all evidence is needed for a satisfactory chemical analysis and an ironclad rule requiring preservation of all evidence would harm the need to sometimes use the entire sample to conduct a reliable chemical test. Secondly, if there is an ironclad rule to keep all evidence in all cases in which first-degree murder is later charged, some defendants will not be charged with first-degree murder simply because many cases (such as missing person cases) do not begin as murder investigations.

The Trial Issues Subcommittee, however, noted that it is currently the practice of law enforcement in Arizona to retain evidence in all unsolved murder cases, as well as in all capital cases for an indefinite period of time. The Trial Issues Subcommittee therefore recommends to the Capital Case Commission that legislation be enacted that would require the preservation of all biological materials found at the scene of all unsolved homicides and in all capital cases until such time as a defendant can be provided an opportunity to request DNA testing of that evidence.

The Attorney General's Law Enforcement Advisory Board deliberated, and not withstanding resource concerns, did not oppose the recommendation. This recommendation will be presented to the Arizona Criminal Justice Commission for consideration.

20. Use of the F6 Aggravator

A.R.S. § 13–703(F)(6) provides that it shall be an aggravating factor if the defendant commits murder in an especially cruel, heinous or depraved manner. Data Set I reveals that of the 228 people sentenced to the death penalty, 62.7% have the death penalty in place (or have been executed, or the death penalty reimposed after appeal), 30.3% received a lesser sentence, 3.1% were acquitted, and 3.5% have appeals pending. Of these 228 people, 39 were sentenced to death based on a finding of the sole aggravator, (F)(6), cruel, heinous or depraved. The (F)(6) aggravator was the leading single aggravator with (F)(5), pecuniary gain being second in 11 such cases. Of the 39 cases, 45% were resentenced to death, 38.5% received a lesser sentence, 5% were acquitted, and 5% have appeals pending.

Some have concluded that these figures indicate a possible abuse of the (F)(6) aggravator and have questioned whether it is consistently applied and whether the aggravator is overly broad. Others assert that a review of recent cases indicates that since the enactment of the natural life sentencing option, the number of cases in which the courts have found the (F)(6) aggravator have decreased.

The Pretrial Issues Subcommittee debated these issues at length and was unable to reach a consensus. The Subcommittee recommended to the Capital Case Commission that additional study be conducted of the (F)(6) aggravator that a murder was committed in an especially cruel, heinous or depraved manner.

21. Review of Capital Cases in Which Convictions Were Reversed, or Sentences Remanded or Modified by the Appellate Court

In December 2000 and January 2001, the Commission agreed on a strategy for the review of cases in which substantive errors were found by reviewing appellate courts in Arizona. The cases of conviction and sentence related reversals, remands and modifications are set forth in Exhibit 22 of the Data Set I Research Report (Attachment "B").

Of the 141 decisions resulting in a reversal, remand or modification, the Trial Issues Subcommittee decided to review the 7 cases in which not guilty verdicts were returned upon retrial and to review the 71 cases in which the defendant was sentenced to life imprisonment or a term of years after retrial or resentencing. The Commission established a uniform set of guidelines to assist in examining these cases. Commission members were asked to consider issues such as why the conviction or sentence was reversed; whether the error is likely to reoccur; whether safeguards were in place at the time of the original trial or have since been adopted; and whether Commission members recommend changes based on the cases reviewed.

The Trial Issues Subcommittee invited Commission members to join them for an in-depth study of the 78 cases. The goal of the study was to determine whether additional recommendations for reform are needed. On August 29, 2001, the Trial Issues Subcommittee held a retreat hosted by John Stookey and Osborn Maledon to discuss the analyses of the 78 cases in which a death sentence was overturned and the defendant found not guilty, given life imprisonment or given a term of years on resentencing. At a subsequent meeting held on March 20, 2002, the Trial Issues Subcommittee discussed the recommendations from the August 29, 2001 meeting and concluded:

- It had been proposed that a survey of capital representation be conducted to get a current snapshot of the death penalty process in Arizona. The Trial Issues Subcommittee later concluded that the survey as proposed could not be realistically accomplished.

- That a recommendation be made to the Commission to affirm and emphasize its previous statement regarding the Legislature's failure to appropriate the additional resources needed at the trial and PCR level for capital cases.

- That a recommendation be made to the Commission that would strengthen and enforce the Ethical Rules holding supervisors in public defenders= offices responsible for supervising counsel appointed in capital cases.

- That a recommendation be made to the Commission that would change Rule 45(a) Continuing Legal Education Requirements for continuing legal and judicial education for prosecutors and judges before being assigned a capital case. See Section 8, infra, for the Commission's precise recommendation on legal education of lawyers and judges who work on capital cases.

22. Race-neutral Decisions

Data Set I shows that 69.1% of the defendants sentenced to death in Arizona are Caucasian; 15.7% Mexican American/Hispanic; 11.3% African American; and 1.7% Native American. Further, we know that 81.9% of the victims of Caucasian defendants are Caucasian and 60.9% of the victims of defendants of other races are themselves of other races or ethnicities.

Data Set II indicates that of 260 Caucasian defendants charged with first-degree murder in Arizona over the past five years, 151 or 58% were noticed for the death penalty, 79 or 52% of those went to trial, 62 or 78% of those were convicted of first-degree murder and 18 or 29% of those received the death penalty. Conversely, of the 401 minority defendants charged with first-degree murder, 144 or 36% were noticed with the death penalty, 68 or 47% went to trial, 45 or 66% of those tried were convicted of first-degree murder and 11 or 24% of those convicted received the death penalty. See Exhibit 15 of Data Set II for an in-depth analysis of this data.

Some Commission members conclude from these statistics that there does not appear to be a racial bias in the administration of the death penalty in Arizona. Other Commission members conclude that there may be a bias based on the race of the victim, or that it is impossible to draw conclusions regarding bias in the system. (See Comment by John A. Stookey, infra.)

The Attorney General does not believe the statistics developed by the Data Subcommittee support an allegation of racial bias in the process. Statistics relating to the race of the victim are not necessarily informative regarding racism. An analysis of whether race plays a role in the process is more appropriately focused on the race of the *defendant.* Statistics developed by the Data Subcommittee show that Caucasian defendants are treated essentially the same as non-Caucasian defendants from indictment to conviction and sentencing. The only significant statistical difference noted in the process as it relates to the race of the defendant is that the conviction rate for Hispanic defendants is lower than that for Caucasian defendants and for non-Hispanic minority defendants. Caucasians do not appear to be treated more leniently than non-Caucasians. In fact, a Caucasian defendant who commits a murder

similar to that committed by a non-Caucasian defendant is slightly more likely to receive the death penalty than a non-Caucasian defendant. Seventeen out of the 22 people executed in Arizona since the State's death penalty statute was amended in 1973 were Caucasian, and approximately 70% of the current death-row population in Arizona is Caucasian. Thus, any suggestion that Arizona's death penalty process reflects a racial bias appears to be unwarranted.

Statistics relating to the race of the victim may be misleading because they may relate to the type of murder committed rather than to the way the defendant is treated in the death penalty process. Some types of murders are less likely to be pursued as a capital case, not because of the race of the victim, but because of the nature of the murder. If, for example, a murder occurs during a gang incident, there is less likelihood of the death penalty being sought or imposed for a number of reasons. There may be some degree of fault on the part of the murder victim, there may be a problem with the credibility of witnesses to the crime, or an unwillingness on the part of witnesses to assist with the prosecution. If, as appears to be the case, the percentage of non-Caucasians involved in gang murders is higher than that for Caucasians, see Appendix B, Chart prepared by Maricopa County Attorney's Office, statistics relating to the race of the victim as an indicator of whether the death penalty will be sought or imposed may be skewed.

Commission members unanimously agree that it is the responsibility of all participants in the criminal justice system to promote practices that ensure that race-neutral decisions are made regarding defendants and victims when deciding whether to seek or impose capital punishment, and that participants in the system should use the empirical data from Data Sets I and II in internal reviews and discussions regarding the death penalty process.

23. Requests for a Moratorium on the Death Penalty in Arizona

After the United States Supreme Court issued its ruling in *Ring v. Arizona* finding Arizona's death penalty statute unconstitutional, several members of the Commission urged the Commission to recommend a moratorium on the death penalty in Arizona. Those members of the Commission argued that the likelihood of error in capital cases, together with uncertainty resulting from the *Ring* decision, warranted such a moratorium. See Comment submitted by John A. Stookey, infra. A majority of Commission members, including the Attorney General, disagreed and declined to recommend a moratorium.